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13

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

16 SHARIAR JABBARI and KAYLEE
17 HEFFELFINGER, on behalf of themselves
and all others similarly situated,

18 Plaintiffs,

19 vs.

20 WELLS FARGO & COMPANY and WELLS
21 FARGO BANK, N.A.,

22 Defendants.

23 Case No. 15-cv-02159-VC

24 **DEFENDANTS' NOTICE OF MOTION
AND MOTION TO COMPEL
ARBITRATION OF PLAINTIFF KAYLEE
HEFFELFINGER'S CLAIMS**

25 [Declaration of Connie Kotzman and Proposed
Order filed concurrently herewith]

26 [REDACTED VERSION OF DOCUMENT
SOUGHT TO BE SEALED]

27 Judge: Hon. Vince Chhabria
Ctrm.: 4
Date: September 10, 2015
Time: 10:00 a.m.

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1 **PLEASE TAKE NOTICE THAT** at 10:00 am on September 10, 2015, or as soon
2 thereafter as the parties may be heard, in Courtroom 4 of the United States District Court for the
3 Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California,
4 Defendants Wells Fargo & Company and Wells Fargo Bank, N.A., will and hereby do move the
5 Court for an order compelling Plaintiff Kaylee Heffelfinger to submit her claims in this action to
6 binding individual arbitration.

7 **STATEMENT OF RELIEF SOUGHT**

8 Wells Fargo seeks an order compelling Heffelfinger to arbitrate her claims on an individual
9 basis, consistent with the terms of her arbitration agreement with Wells Fargo Bank, N.A.

10 **ISSUE TO BE DECIDED**

11 Should Heffelfinger be compelled to resolve her dispute with Wells Fargo Bank in
12 individual arbitration, pursuant to the terms of the arbitration agreement that governed her
13 relationship with the bank?

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **I. INTRODUCTION**

16 Plaintiff Kaylee Heffelfinger's claims must be submitted to binding arbitration. When
17 Heffelfinger opened her Wells Fargo bank accounts in March 2012, she signed an account
18 application form certifying that she would arbitrate all disputes with the bank—including the
19 claims she makes in this lawsuit. At that time, Heffelfinger also received a Consumer Account
20 Agreement (“CAA”), which provided in its first substantive provision that “you and the Bank
21 agree, at your or the Bank’s request, to submit to binding arbitration all claims, disputes, and
22 controversies between or among you and the Bank.” Heffelfinger was again informed of her
23 agreement to arbitrate all disputes with Wells Fargo in August 2012, when she enrolled in online
24 banking, and then again in March 2013, when she opened a new savings account. In addition,
25 Heffelfinger’s use of Wells Fargo’s banking services after being informed of the arbitration
26 agreement constitutes her acceptance, by conduct, of the terms of the agreement.

1 The Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, requires enforcing Heffelfinger's
2 agreement to arbitrate her disputes with Wells Fargo.

3 **II. BACKGROUND**

4 **A. Heffelfinger's January 2012 Accounts**

5 Checking [REDACTED] and savings [REDACTED] accounts were opened for Heffelfinger on January 21,
6 2012.¹ Declaration of Connie Kotzman ("Kotzman Decl.") ¶ 13, Ex. 3. [REDACTED]
7 [REDACTED]

8 [REDACTED] Heffelfinger asserts that the signature on the application
9 for these accounts was forged. Consolidated Amended Complaint ("CAC") ¶ 65.² [REDACTED]
10 [REDACTED]

11 **B. Heffelfinger's March 2012 Accounts**

12 On March 16, 2012, Heffelfinger opened two accounts with Wells Fargo Bank, a checking
13 account [REDACTED] and a savings account [REDACTED]. CAC ¶ 64; Kotzman Decl. ¶ 16, Ex. 4. [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 _____
24 ¹ Heffelfinger's Wells Fargo accounts are referred to here by their last four digits.

25 ² Wells Fargo has submitted the applications for Heffelfinger's various personal accounts together
26 with this motion. Although these are true and correct copies of its business records, Wells Fargo
27 is not by submitting them making any representation as to the genuineness of Heffelfinger's
signatures, which she disputes. None of Wells Fargo's arguments is premised on the assertion that
Heffelfinger signed the [REDACTED] account application. Wells Fargo *does* assert that
Heffelfinger signed the account applications for account numbers [REDACTED].

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]

4 Each time a Wells Fargo customer opens a new account, he or she receives a CAA, which
 5 provides the terms that govern the account. Kotzman Decl. ¶ 8. The CAA that Heffelfinger
 6 received when she opened her March 2012 accounts was dated effective October 15, 2011. *Id.* ¶
 7 9, Ex. 1. It was part of a shrink-wrapped package of information that she was given, called a
 8 “New Account Kit.” *Id.* ¶ 8.

9 Prominently featured in the CAA is an arbitration provision entitled, “Dispute resolution
 10 program: arbitration agreement.” *Id.* Ex. 1 at 4. It states that “[i]f you have a dispute with the
 11 Bank, and you are not able to resolve the dispute informally, you and the Bank agree that upon
 12 demand by either you or the Bank, the dispute will be resolved through the arbitration process as
 13 set forth in this part.” *Id.* “Dispute” is defined as follows:

14 [A]ny unresolved disagreement between you and the Bank. It includes any
 15 disagreement relating in any way to services, accounts or matters; to your use
 16 of any of the Bank’s banking locations or facilities; or to any means you may
 17 use to access your account(s). It includes claims based on broken promises or
 contracts, torts, or other wrongful actions. It also includes statutory, common
 law, and equitable claims.

18 *Id.* “Dispute” also includes any “disagreements about the meaning, application or enforceability
 19 of this arbitration agreement.” *Id.*; *see also id.* (providing that “[t]he arbitrator shall decide any
 20 dispute regarding the enforceability of this arbitration agreement”).

21 The CAA’s arbitration provision states in bold-faced, capital letters that **“YOU AGREE**
22 THAT YOU AND THE BANK ARE WAIVING THE RIGHT TO A JURY TRIAL OR
23 TRIAL BEFORE A JUDGE IN A PUBLIC COURT.” The provision emphasizes the
 24 following provision:

25 **NEITHER YOU NOR THE BANK SHALL BE ENTITLED TO**
JOIN OR CONSOLIDATE DISPUTES BY OR AGAINST OTHERS
IN ANY ARBITRATION, OR TO INCLUDE IN ANY
ARBITRATION ANY DISPUTE AS A REPRESENTATIVE OR
MEMBER OF A CLASS.

26 *Id.*

1 Finally, the CAA's arbitration provision states that arbitrations "shall be administered by
2 the American Arbitration Association (AAA) . . . according to the Commercial Arbitration Rules
3 and the Supplemental Procedures for Consumer Related Disputes" and that the agreement is
4 "governed by the provisions of the Federal Arbitration Act." *Id.*

5 **C. Heffelfinger's October 2012 Accounts and March 2013 Savings Account**

6 On October 4, 2012, two additional accounts were opened for Heffelfinger—a checking
7 account [REDACTED] and a savings account [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 On March 6, 2013, an additional savings account [REDACTED] was opened for Heffelfinger. *Id.*

22 ¶ 20, Ex. 6-7. [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 D. Heffelfinger's Online Banking

19 [REDACTED]
20 [REDACTED]
21 [REDACTED] The OAA in effect when Heffelfinger enrolled in online
22 banking provided:

23 By clicking "I Agree" below or using the Service, you are agreeing to the
24 terms of this Agreement. This Agreement includes, among other
25 things . . . your agreement with us to use binding arbitration for most
26 disputes arising under this Agreement or concerning the Service and to
waive the right to a trial by jury; your waiver of class-action rights . . .

27 *Id.* Ex. 2 at 1.
28

1 The OAA's arbitration provision requires arbitration of any dispute concerning Wells
 2 Fargo's online services and the "interpretation of this Agreement (including the meaning of this
 3 arbitration agreement and whether a disagreement is a 'dispute' subject to binding arbitration as
 4 provided for in this arbitration agreement)." *Id.* Ex. 2 at 32. The OAA explains that "[d]isputes
 5 arising under any separate agreement governing your other Eligible Accounts will be governed by
 6 the dispute resolution and governing law provisions of that agreement, which also take precedence
 7 over this section." *Id.* [REDACTED]

8 [REDACTED]

9 **III. ARGUMENT**

10 **A. Heffelfinger Agreed to Arbitration With Wells Fargo.**

11 The FAA "mandates that district courts *shall* direct parties to proceed to arbitration on
 12 issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*,
 13 470 U.S. 213, 218 (1985). The threshold question for the court to decide is whether the parties
 14 entered into an agreement to arbitrate. *See AT&T Techs., Inc. v. Commc'n Workers of Am.*, 475
 15 U.S. 643, 649 (1986).

16 A person who signs a contract is bound by its provisions, whether or not he reads them.
 17 *See Sovereign Camp, W.O.W. v. Daniel*, 48 Ariz. 479, 487 (1936).³ A person may also assent to a
 18 contract through action or inaction. *See, e.g., Carroll v. Lee*, 148 Ariz. 10, 13-14 (1986); *see also*
 19 RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. a (1981) ("Just as assent may be manifested by
 20 words or other conduct, sometimes including silence, so intention to make a promise may be

21

22 ³ The 2011 CAA contains a contractual choice-of-law provision stating: "Your account is
 23 governed by the laws and regulations of the United States and, to the extent applicable, the laws of
 24 the state in which the office of the Bank that maintains your account is located . . . without regard
 25 to conflicts of laws principles." Kotzman Decl. ¶ 9, Ex. 1 at 40. Under this provision, Arizona
 26 substantive law applies because Heffelfinger's accounts were opened and maintained by offices in
 27 Phoenix, Arizona. *See Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1164 (9th
 28 Cir. 1996) (under California choice-of-law analysis, a choice-of-law clause is binding on the
 parties to a contract unless "(1) the chosen state does not have a substantial relationship to either
 the parties or the transaction; or (2) application of the chosen state's law would be contrary to a
 fundamental policy of a state with a materially greater interest in the particular issue.") (quoting
Nedlloyd Lines B.V. v. Superior Court, 3 Cal. 4th 459 (1992)).

1 manifested in language or by implication from other circumstances, including course of dealing or
 2 usage of trade or course of performance.”).

3 Heffelfinger assented to the arbitration provision contained in the CAA when she opened
 4 and used her accounts. She admits that she opened two accounts with Wells Fargo in 2012, *see*
 5 CAC ¶ 64, at which time she signed an account application stating that she had received a copy of
 6 the CAA and agreeing to be bound by its terms, including “the terms of the dispute resolution
 7 program described in the account agreement.” Kotzman Decl. Ex. 4 at 2. Heffelfinger also
 8 received a copy of the CAA that included an arbitration clause. *Id.* ¶¶ 8-9, Ex. 1. The CAA in
 9 turn provides that “[b]y signing the Bank’s signature card for your account or using your account
 10 or service, you will be considered to have received and agreed to this Agreement.” *Id.* Ex. 1 at 1.

11 Thus, Heffelfinger had both actual and constructive notice of the CAA. She agreed to the
 12 arbitration provision it contained by signing the consumer account applications and using the
 13 accounts. *See Sovereign Camp*, 48 Ariz. at 487; *Ackerberg*, 898 F. Supp. 2d at 1176.

14 Heffelfinger was further informed of her agreement to arbitrate all disputes with the bank
 15 in [REDACTED], when she enrolled in online banking,⁴ and in March 2013, when she signed an
 16 additional account application certifying that she agreed to arbitrate disputes with the bank. *See*
 17 Kotzman Decl. ¶¶ 10-12, 20, Ex. 2, 6.

18 **B. The Dispute is Arbitrable, But the Court Should Not Reach that Question.**

19 **1. Interpretation of the Arbitration Agreement Has Been Clearly and
 Unmistakably Assigned to the Arbitrator.**

20 The “arbitrability” question—*i.e.*, whether a particular dispute is subject to an agreement to
 21 arbitrate—may be decided by either the court or the arbitrator, depending on the parties’

23 ⁴ The OAA is a type of “clickwrap” agreement. “Clickwrap” agreements “have been routinely
 24 upheld by circuit and district courts” as enforceable contracts because they put users on notice of
 25 the terms to which they are assenting. *See, e.g., Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171,
 26 1175-76 (9th Cir. 2014); *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904 (N.D. Cal.
 27 2011); 9A Ariz. Prac., Business Law Deskbook § 35:77 (2014-2015 ed.) (noting that “clickwrap
 28 agreements have been held to be generally valid and enforceable contracts”). Under the OAA,
 Heffelfinger consented to arbitrating all disputes concerning Wells Fargo’s online services and
 was expressly informed that her personal accounts were governed by the dispute resolution
 provision of the CAA. Kotzman Decl. Ex. 1 at 32-33.

1 agreement. *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010). If the agreement
 2 “clearly and unmistakably” provides that the arbitrator should decide questions of arbitrability,
 3 then the court must honor that agreement. *AT&T Tech.*, 475 U.S. at 649.

4 The arbitration agreement here clearly and unmistakably assigns those questions to the
 5 arbitrator. The agreement provides that “disputes” will be arbitrated and states that disputes
 6 “include disagreements about the meaning, application or enforceability of this arbitration
 7 agreement.” Kotzman Decl. Ex. 1 at 4. It further states that “[a] dispute also includes any
 8 disagreement about the meaning of this Arbitration Agreement, and whether a disagreement is a
 9 ‘dispute’ subject to binding arbitration as provided for in this Arbitration Agreement.” *Id.* The
 10 agreement also makes clear that “[t]he arbitrator shall decide any dispute regarding the
 11 enforceability of this arbitration agreement.” *Id.*

12 That language could not be more clear. *See Tuminello v. Richards*, 504 F. App’x 557, 558
 13 (9th Cir. 2013) (holding that a contract providing that “the arbitrator shall decide ‘any and all
 14 controversies . . . concerning any account(s), transaction, dispute or the construction, performance,
 15 or breach of this or any other Agreement’ . . . provides clear and unmistakable evidence that the
 16 parties intended the question of arbitrability to be decided in arbitration”). Even without it,
 17 however, the issue of arbitrability would still be one for the arbitrator because the agreement
 18 incorporates the AAA Commercial Arbitration Rules, Rule 7(a) of which provides that the
 19 arbitrator shall decide the validity of the arbitration agreement and the arbitrability of any claim.
 20 Kotzman Decl. Ex. 1 at 4. *See, e.g., Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074
 21 (9th Cir. 2013); *see also Scott Patrick, Inc. v. McMurdie*, No. 1 CA-SA 07-0118, 2007 WL
 22 5517488, at *5 (Ariz. Ct. App. Aug. 30, 2007) (same). The Court should therefore compel
 23 arbitration, leaving for the arbitrator to decide (to the extent the matter is disputed) whether
 24 Heffelfinger’s claims are within the scope of the agreement.

25 **2. If the Court Were To Reach the Question of Arbitrability,
 26 Heffelfinger’s Claims Should Be Arbitrated.**

27 If the Court were to reach the question whether Heffelfinger’s claims fall within the
 28 arbitration agreement, the answer would be that they do.

1 “An order to arbitrate the particular grievance should not be denied unless it may be said
 2 with positive assurance that the arbitration clause is not susceptible of an interpretation that covers
 3 the asserted dispute.” *AT&T Techs.*, 475 U.S. at 650 (1986) (quoting *United Steelworkers v.*
 4 *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). And where the arbitration clause is
 5 sufficiently broad, as is the case here, there is a heightened presumption of arbitrability such that
 6 “[i]n the absence of any express provision excluding a particular grievance from arbitration, we
 7 think only the most forceful evidence of a purpose to exclude the claim from arbitration can
 8 prevail.” *Id.*; see also *World Grp. Secs., Inc. v. Allen*, No. CV 07-1657-PHX-JAT, 2007 WL
 9 4168572, at *5 (D. Ariz. Nov. 20, 2007) (applying Arizona contract law to find that successor-
 10 liability claims fell within the parties’ agreement to arbitrate all disputes concerning the accounts).

11 The CAA states that “[i]f you have a dispute with the Bank, and you are not able to resolve
 12 the dispute informally, you and the Bank agree that upon demand by either you or the Bank, the
 13 dispute will be resolved through the arbitration process as set forth in this part.” Kotzman Decl.
 14 Ex. 1 at 4. It then defines “dispute” as broadly as possible to include any disagreement between
 15 the customer and the bank: “A ‘dispute’ is any unresolved disagreement between you and the
 16 Bank.” *Id.* The agreement provides examples of things that would come within that expansive
 17 scope: “It includes any disagreement relating in any way to services, accounts or matters; to your
 18 use of any of the Bank’s banking locations or facilities; or to any means you may use to access
 19 your account(s). It includes claims based on broken promises or contracts, torts, or other wrongful
 20 actions. It also includes statutory, common law, and equitable claims.” *Id.*

21 Heffelfinger’s claims are, obviously, a disagreement with the bank. Moreover, they
 22 concern her accounts. She alleges that Wells Fargo used her personal information to open
 23 unauthorized accounts in her name, CAC ¶ 64-66, and persuaded her to open accounts she did not
 24 want by representing that she needed two accounts to receive a debit card, CAC ¶ 64. If
 25 Heffelfinger is complaining about fees charged to her account, or about her accounts being sent to
 26 collections, that is obviously a dispute related to her account. The Amended Complaint
 27 specifically seeks restitution on behalf of Heffelfinger. *Id.* at 31. Any amount that Wells Fargo
 28

1 might have received from Heffelfinger that could possibly be owed in restitution would have come
 2 from money Heffelfinger deposited in her accounts. Heffelfinger also complains of Wells Fargo's
 3 business model "built in part on signing its customers up for multiple accounts," *id.* ¶ 25, and
 4 alleges that Wells Fargo's bankers use inaccurate or misleading information to induce customers
 5 to open additional accounts, *id.* ¶¶ 32, 86(C), bundle services so that unauthorized accounts are
 6 opened at the same time as authorized accounts, *id.* ¶ 36, and do not close preexisting accounts in
 7 order to get credit for a new "sale," *id.* ¶ 41. On their face, these claims relate to Heffelfinger's
 8 accounts.

9 **C. Heffelfinger Should Be Compelled to Arbitrate on an Individual Basis**

10 The CAA's arbitration provision prohibits class arbitration, Kotzman Decl. Ex. 1 at 4, and
 11 must be enforced. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748-53 (2011).

12 **D. The Case Should Dismissed or Stayed Pending the Outcome of The Arbitration**

13 The Court may dismiss the Amended Complaint without prejudice. *Sparling v. Hoffman*
 14 *Constr. Co.*, 864 F.2d 635, 638 (9th Cir. 1988). Alternatively, the Court may stay this pending
 15 action, including all discovery, until the conclusion of the arbitration. 9 U.S.C. § 3.

16 **IV. CONCLUSION**

17 For the foregoing reasons, Wells Fargo respectfully requests that the Court grant this
 18 motion to compel arbitration and dismiss this action or stay it pending completion of the
 19 arbitration.

20
 21 DATED: August 13, 2015

MUNGER, TOLLES & OLSON LLP

22
 23 By: /s/ David H. Fry

24 DAVID H. FRY

25 Attorneys for Defendants,
 26 WELLS FARGO & COMPANY and
 27 WELLS FARGO BANK, N.A.
 28